Supreme Court, U.S.
FILED
JUL 30 1999
OFFICE OF THE CLERK

(2)

No. 99-51

In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and MADELINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA AND FELIX P. CAMACHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DENNIS P. RIORDAN
Counsel of Record
DONALD M. HORGAN
DYLAN L. SCHAFFER
523 Octavia Street
San Francisco, California 94102
(415) 431-3472

CURTIS CHARLES VAN DE VELD
THE VAN DE VELD LAW OFFICES
Suite 213, Union Bank Building
194 Hernan Cortes Avenue
Agana, Guam 96910
(671) 472-2863

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1188

QUESTION PRESENTED

Should this Court exercise its discretionary power to review the Ninth Circuit's decision that the Guam Organic Act (48 U.S.C. § 1422) required a runoff between the gubernatorial slates competing in Guam's 1998 general election where

1) that result is compelled by the statutory language expressly requiring a runoff where neither slate garners a majority of votes cast "at any election;"

2) the purported Circuit conflict cited by petitioners invokes a single Third Circuit decision which interprets a different federal statute governing the conduct of elections in a different territorial jurisdiction;

3) that same Third Circuit decision has little current vitality, as reflected by the fact that no federal court has cited it for the proposition on which petitioners rely since it was issued 17 years ago;

4) the decision below creates no potential for multiple gubernatorial run-off elections; and

5) the decision below is consistent with this Court's precedents?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTRODUCTION 1

REASONS WHY THE PETITION SHOULD BE DENIED 1

I. THIS COURT SHOULD DENY THE PETITION BECAUSE PETITIONERS HAVE FAILED TO ESTABLISH THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT 3

A. The Respective Decisions Of The Third And Ninth Circuits Interpret Different Statutes Governing Different Jurisdictions And Therefore Do Not Reflect A Circuit Conflict Warranting Intervention By This Court 3

B. *Todman*'s Defective Analysis And Frailty As Precedent Diminish The Importance Of Any Perceived Circuit Conflict 5

C. The Specter Of Endless Runoff Elections In Guam Is Without Substance 6

D. The Decision Below Is Consistent With This Court's Precedent 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

County of Cass v. Johnston, 95 U.S. 360 (1877) 7

Euwema v. Todman, 323 F.Supp. 167 (D.V.I. 1971) 5, 6

Kungys v. United States, 485 U.S. 759 (1988) 2

McCray v. New York, 461 U.S. 961 (1983) 5

Shapiro v. United States, 335 U.S. 1 (1947) 4

Todman v. Boschulte, 694 F.2d 939 (3rd Cir. 1982) ... 4, 6, 7

STATUTES

48 U.S.C. § 1422 ..... 1, 2, 4, 6, 7

48 U.S.C. § 1591 4

48 U.S.C. § 1712 2

OTHER AUTHORITIES

Stern, et al., *Supreme Court Practice* (7th ed. 1993), section 4.4, p. 172 5

INTRODUCTION

Respondents Joseph F. Ada and Felix P. Camacho (hereafter "respondents" or "Ada"), respectfully request that this Court deny the petition for writ of certiorari filed by petitioners Carl T.C. Gutierrez and Madeline Z. Bordallo (hereafter "petitioners" or "Gutierrez") seeking review of the Ninth Circuit's opinion in this case. Though certified for publication, that opinion has yet to be assigned an official citation in the relevant reporter services. It appears as Appendix A to the Gutierrez petition.[1]

REASONS WHY THE PETITION SHOULD BE DENIED

In his question presented and related discussion, Gutierrez implicitly advances two separate arguments in support of his plea that this Court grant the instant petition for certiorari. The first challenges the Ninth Circuit's decision on substantive grounds and primarily asserts that the Court of Appeals misinterpreted the federal statute (48 U.S.C. § 1422) governing Guam's gubernatorial election when it concluded that the statute's requirement of a majority vote "in any election" refers to a majority of the votes cast at the general election of which the gubernatorial election is necessarily a part. Gutierrez also argues that the decision below creates a legal conflict with a single, 17-year-old Third Circuit

[1] This opposition accordingly cites the Ninth Circuit's opinion by referring to the Petition's Appendix ("App.") and its relevant page number.

decision which interprets a *different* federal statute relating to a *different* territorial jurisdiction than Guam, and which *no* other federal Circuit has ever recognized or applied.

The substantive attack on the Ninth Circuit's decision is unpersuasive for the very reasons stated in the Court of Appeals' opinion itself. Specifically, the lower court's conclusion that "votes cast in any election" means all those cast in the general election is the only reading of the statute which gives meaningful effect to its key provisions. By contrast, if construed as a reference to the gubernatorial election alone, the phrase "in any election" is rendered redundant, in flat defiance of the principle expressed by this Court in *Kungys v. United States*, 485 U.S. 759 (1988). *See* App. at A-9.[2] Similarly, petitioners are unable to explain why, if the statute requires a mere majority of votes cast in a particular race rather than the election at large, it did not simply say so, as does another federal statute (48 U.S.C. § 1712) which petitioners invoked in support of their argument below. *See* App. at A-11 – A-14.

The remaining deficiencies underlying petitioners' substantive arguments, such as their reliance on unrelated provisions of Guam election law and appeals to

---

[2] Petitioners' claim that its reading is most logical because the gubernatorial election is the "singular focus of the provision at issue" (*see* Petition at 9) is belied by section 1422's express requirement that the gubernatorial election be conducted as part and parcel of the *general election* at which Guam voters decide several other issues. *See* section 1422, first paragraph, sixth sentence; *see also* App. at A-4 – A-5 (describing other races contested at the general election).

policy concerns, are readily exposed by reviewing the remainder of the Ninth Circuit's opinion. Additionally, as respondents will now demonstrate, petitioners cannot establish the importance of addressing the issue decided below, a failure which should lead this Court to conclude that certiorari is unwarranted.

I. THIS COURT SHOULD DENY THE PETITION BECAUSE PETITIONERS HAVE FAILED TO ESTABLISH THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule 10.1, this Court will not exercise its discretionary power to review a United States Court of Appeals' decision on certiorari unless there are "special and important reasons therefor." Indeed, while the Rule states that such reasons *may* appear where, *inter alia*, a Court of Appeals' decision conflicts with that of another Court of Appeals on the same matter (*see* Rule 10.1[a]), or where that Court has decided a question of federal law which has not been resolved by this Court (*see* Rule 10.1[c]), the presence of special and important reasons remain the *sine qua non* of certiorari review.

A. The Respective Decisions Of The Third And Ninth Circuits Interpret Different Statutes Governing Different Jurisdictions And Therefore Do Not Reflect A Circuit Conflict Warranting Intervention By This Court

Gutierrez makes much (Petition at 6-8) of a purported conflict between the Ninth Circuit's interpretation

of the majority requirement under the Guam statute (48 U.S.C. § 1422) and the Third Circuit's interpretation of the majority requirement under a similar statute governing gubernatorial elections in the Virgin Islands (48 U.S.C. section 1591). *See Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). While it is true, as the Ninth Circuit's opinion noted (App. at A-14 – A-15), that the text relating to the respective majority requirements in the two statutes is identical, the fact remains that the statute considered in the case below – 48 U.S.C. § 1422 – and that considered in *Todman* – 48 U.S.C. § 1591 – are *different* statutes governing electoral processes in two *different* territorial jurisdictions, i.e., Guam and the Virgin Islands.

Under these circumstances, Gutierrez cannot found his claim of importance on a Circuit conflict arising from contrary interpretations of a single federal statute having national application. *Compare Shapiro v. United States*, 335 U.S. 1 (1947) (resolving conflict over differing Circuit interpretations of the Emergency Price Control Act). The present issue has apparently confronted the Virgin Islands and Guam one time in their respective histories, and each territory has received a judicial interpretation of its governing election statute which will control the outcome of any future disputes implicating this issue in that territory. The differing territorial approaches to this issue are no less legitimate or tolerable than are the differing "majority" calculations adopted by various state jurisdictions, as are discussed in the opinion below (App. A at A-17 – A-20).[3]

[3] Furthermore, should other Circuits choose to consult the Ninth Circuit's decision and/or *Todman* to assist in interpreting the majority requirement of any *other* federal statutes, this Court would plainly benefit from such further study. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court").

Accordingly, the notion that "future litigation in election cases is virtually guaranteed" in these two Territories unless the "conflict" is resolved (*see* Petition at 15) is meritless. Any gubernatorial candidate in either territory will know that the interpretation rendered by the Circuit within which his or her territory is located controls and is not subject to challenge on the basis of arguably conflicting case law from a different jurisdiction.

B. *Todman*'s Defective Analysis And Frailty As Precedent Diminish The Importance Of Any Perceived Circuit Conflict

Consistent with Rule 10, commentators have correctly observed that a conflict between a Court of Appeals decision and one which has lost all vitality is not an adequate basis for granting certiorari. *See*, e.g., Stern, et al., *Supreme Court Practice* (7th ed. 1993), section 4.4, p. 172, and citations contained therein.

This principle applies here. As the decision below explains, by adhering to a majority calculation that ignores the undervotes, overvotes, and write-ins returned in a general election, *Todman* flatly misinterpreted the single federal decision (*Euwema v. Todman*, 323 F.Supp. 167 [D.V.I. 1971]) on which it was founded. *See* App. A at A-14 – A-17. Furthermore, as the Ninth Circuit also observed (App. A at A-17, n.8), despite the fact that

Todman was decided some 17 years ago, no federal court has *ever* cited it for the proposition on which petitioners rely, a telling measure of its current frailty as relevant precedent.

By contrast, the Ninth Circuit's decision in this case gives effect to both the plain meaning of the relevant statutory language and to the statement of governing principles contained in *Euwema*. Furthermore, by requiring a majority of *general* election participants, it accommodates the statute's implicit concern for ensuring greater legitimacy where gubernatorial elections are involved.[4] Given the soundness of the analysis of the decision below, it should be permitted to stand.

C. The Specter Of Endless Runoff Elections In Guam Is Without Substance

As explained by the Court in *Euwema*, which *Todman* so egregiously misconstrued, a runoff election would constitute a *special*, rather than a *general* election; as such, the slate garnering the greater number of affirmative gubernatorial votes in the runoff would necessarily prevail, regardless of the number of votes expressing no discernible preference. *See* Ninth Circuit's discussion of *Euwema* at App. A-15 – A-17. Notably, section 1422 does not purport to impose its general election requirement of a majority vote on the *runoff* election for which it also

[4] This feature of the decision below also undermines Gutierrez's claim that the present issue warrants review because the citizens of Guam will not understand the Ninth Circuit's disposition, or that the costs of a runoff are too great for its citizenry to bear. *See* Petition at 14-15.

provides. That being so, the specter raised by Gutierrez of potentially endless runoff elections in Guam, should the Ninth Circuit's reading of § 1422 remain in effect, is indeed a fiction.

D. The Decision Below Is Consistent With This Court's Precedent

Finally, Gutierrez suggests (but does not expressly argue) that the writ should be granted because the Ninth Circuit's decision conflicts with this Court's decision in *County of Cass v. Johnston*, 95 U.S. 360 (1877), which he identifies as the source of the *Todman* approach. *See* Petition at 7. As the Ninth Circuit recognized, however, *County of Cass* is inapposite because it held only that qualified voters who do not go to the polls at all should be excluded when calculating a majority, and qualified voters who did not participate in the Guam election were not at issue below. *See* App. A at A-18. In addition, *County of Cass* noted that its holding applied only in the *absence* of a statutory provision to the contrary, which, as the Ninth Circuit correctly found, § 1422 plainly supplies in this case. *See* App. A at A-18. The presence of a conflict between the decision below and this Court's precedent is not an available basis for granting review.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: July 30, 1999

Respectfully Submitted,

DENNIS P. RIORDAN
Counsel of Record
DONALD M. HORGAN
DYLAN L. SCHAFFER
523 Octavia Street
San Francisco, California 94102
(415) 431-3472

CURTIS CHARLES VAN DE VELD
THE VAN DE VELD LAW OFFICES
Suite 213, Union Bank Building
194 Hernan Cortes Avenue
Agana, Guam 96910
(671) 472-2863

Counsel for Respondents